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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JAMES O. McCUE, JR. and
JAMES O. McCUE, SR.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1961

JAMES O. McCUE, JR. and JAMES O. McCUE, SR., *Petitioners,* v. UNITED STATES OF AMERICA, *Respondent.*	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners James O. McCue, Jr. and James O. McCue, Sr. respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgments of that Court dated March 20, 1962 (reprinted in Appendix A hereto), affirming judgments of conviction against petitioners entered in the United States District Court for the District of Connecticut for violations of the False Statements Act, 18 U.S.C. § 1001.

The cases were argued together in the court below, which wrote one opinion. Since the cases involve identical questions, a single petition is filed under this Court's Rule 23(5).

Opinions Below

The opinion of the court below has not yet been reported. It is separately presented in Exhibit B hereto. The District Court wrote two opinions. One is reported at 178

F. Supp. 426; the other is not reported. Both are printed at P.A. 115a-134a and 148a-151a.*

Jurisdiction

The judgments of the Court of Appeals were entered on March 20, 1962. A petition for rehearing was denied by the Court of Appeals on April 20, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. When one of two defendants pleads *nolo contendere* to, is sentenced upon and accepts punishment for a criminal offense in reliance on the United States Attorney's representation that his plea will dispose of certain other related alleged crimes against both defendants, whether this Court will permit the Government thereafter to prosecute the defendants for such other alleged crimes when the Government's reasons for so doing are (i) disappointment in the result of the first prosecution and (ii) dissatisfaction with the conduct of the United States Attorney who handled the first prosecution. This question involves also the extent to which this Court will permit Government prosecutors to bring multiple prosecutions for two alleged offenses, when both arise out of the same transactions and are known to the Government at the time of the first prosecution.

2. (a) Whether an individual suspected of having committed a criminal offense, who is interrogated in the course of a criminal investigation by criminal investigators who are gathering evidence of guilt to use against him, is guilty of a crime under the False Statements Act,

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*"P.A." refers to Petitioners' (Appellants') Appendix and "G.A." refers to Government's (Appellee's) Appendix, both in the Court of Appeals.

18 U. S. C. § 1001, when he gives a false exculpatory answer to questions concerning his suspected criminal conduct.

(b) Whether an individual who gives oral answers in response to interrogation by Government investigators is guilty of a crime under the False Statements Act, 18 U. S. C. § 1001.

3. Whether fair standards of federal criminal justice are violated when Government prosecutors fail to record the testimony of witnesses appearing before a grand jury. This question involves also the extent to which this Court will permit Government prosecutors to engage in selective recording of grand jury testimony by following a "rule" which prescribes the non-recording of all testimony of federal agents and thereby grants them special protection from impeachment on cross-examination.

4. Whether the question asked of McCue, Sr., to which he made an allegedly false statement in violation of 18 U. S. C. § 1001, was too vague and ambiguous to support a conviction under the standards laid down both by this Court and by the lower federal courts.

Statute Involved

The statute involved is 18 U. S. C. § 1001:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Statement of the Case

Petitioners were separately indicted on February 2, 1959, for making false statements to Special Agents of the Internal Revenue Service with reference to matters affecting petitioners' personal income tax liability and the income tax liability of Stamford Rolling Mills Company, a corporation of which McCue, Sr. was President and McCue, Jr., Vice-President (P.A. 6a-8a, 418a-420a).

1. The Special Agent's Investigation.

The alleged false statements grew out of an income tax investigation of the petitioners and of the Stamford Rolling Mills Company by the Internal Revenue Service with respect to the years 1946 to 1952, inclusive (P.A. 160a-161a, 435a).

From 1952 on, the investigation was in the charge of a Special Agent of the Intelligence Division of the Internal Revenue Service (P.A. 165a, 437a), who testified in the proceedings below that his job was that of a criminal fraud investigator (P.A. 434a-435a).

In a report he made in 1955, the Special Agent recommended that the McCues be prosecuted for tax evasion (P.A. 178a, 451a-452a).

Prior to rendering his 1955 report, on August 13, 1954, at a time when the investigation was virtually complete, the Special Agent interrogated McCue, Sr. (P.A. 437a). On August 31, 1954, he interrogated McCue, Jr. (P.A. 173a). Both defendants were under oath at their interrogations (P.A. 162a, 430a). Statements made by them in response to questions by the Special Agent constitute the alleged false statements and representations on which the present convictions are based. Although the Special Agent did not recommend prosecution of the McCues for alleged false statements in his final report, he did discuss the statements made by them; his report alleged that certain of these statements were false (P.A. 33a, 38a, 93a, 104a, 179a, 451a).

Both the alleged false statements made by McCue, Sr. on August 13, 1954 and those by McCue, Jr. on August 31, 1954, related to (1) alleged fictitious business trips taken by the petitioners on behalf of the Stamford Rolling Mills Company; (2) fuel oil delivered to and used on the personal estates of the petitioners but paid for by the Stamford Rolling Mills Company; and (3) water well drilling services performed on the personal estates of the petitioners but paid for by the Stamford Rolling Mills Company (P.A. 6a-8a, 418a-420a).

2. The Prior 1957 Tax Evasion Prosecutions.

The convictions at bar represent the second round of prosecutions of these petitioners growing out of the same transactions.

In 1957, five years after the Special Agent began his criminal investigation, the petitioners were indicted for tax evasion in violation of 26 U. S. C. § 145(b), Internal Revenue Code of 1939 (P.A. 14a-18a). The indictments were based, at least in part, on three transactions: (1) corporate reimbursement for allegedly fictive travel, (2) corporate payment for fuel oil used at home, and (3) corporate payment for well drilling done at home (P.A. 24a-25a, 108a, 118a).

The indictments were followed by a series of conferences between counsel for petitioners and the United States Attorney for the District of Connecticut looking toward disposition of the pending charges. Eventually an agreement was reached: McCue, Sr. was to plead *nolo contendere* to charges under § 145(a) (the misdemeanor provision) rather than § 145(b) (the felony provision) (P.A. 39a); the charges against McCue, Jr. would be dismissed (P.A. 31a-32a); this disposition of the pending charges would also dispose of another alleged crime then known to the Government arising out of the tax investigation—that in 1954 the defendants had given false answers to

Special Agents' questions concerning the same (1) travel reimbursement, (2) fuel oil, and (3) well drilling transactions as to which tax evasion indictments were pending (P.A. 12a, 99a-100a, 110a). With respect to the last aspect of the agreement, the Court of Appeals stated in its opinion:

> "... it may be assumed, for our purposes, that both the United States Attorney and counsel for defendants understood that the offenses which are the subject of the present prosecution were to be included in the agreed upon disposition of the matter." (App. B, p. 14a).

The tax indictments were disposed of in accordance with the foregoing agreement on April 15, 1957 (P.A. 557a-567a). McCue, Sr. pleaded *nolo contendere*, thereby subjecting himself to the risk of imprisonment and substantial fines; neither he nor the Government had any assurance as to what the sentence would be. He was fined $20,000, sentenced to jail for one year, execution of which was suspended, and he was placed on probation for two years (P.A. 565a-566a).

The Department of Justice officials thereafter decided, however, to repudiate the agreement. On or about April 22, 1957, the Government moved to vacate the judgment entered in McCue, Sr.'s case.

The District Court denied the Government's motion, *United States* v. *McCue*, 160 F. Supp. 595 (D. Conn. 1958).

Ten months later the present indictments against the McCues were returned on the basis of the same false statement allegations the Government had agreed to put to rest as part of the 1957 agreement.

3. The Alleged False Statements.

McCue, Jr. was convicted of having made two allegedly false statements to Special Agents of the Internal Revenue

Service: (a) He affirmed that, to the best of his knowledge, he was at the places shown on the dates shown on certain "memos" (P.A. 164a)—McCue, Jr. received reimbursement from Stamford Rolling Mills for expenses on the basis of these "memos" (P.A. 193a). (b) He denied having any knowledge of who negotiated to have well drilling services performed at his home (P.A. 162a).

McCue, Sr. was convicted of having made an allegedly false statement to Special Agents of the Internal Revenue Service in connection with well drilling services performed at his home (P.A. 437a).

4. Lack of Grand Jury Transcripts.

When McCue, Jr., the first of the petitioners to be tried requested the trial court to examine the grand jury testimony of certain witnesses to determine whether prior inconsistent statements had been made, these requests could be granted only in part: (a) none of the testimony before the grand jury that handed down the 1957 tax evasion indictments was recorded; and (b) although the testimony of certain witnesses before the grand jury that handed down the present indictments was recorded, an exception had been made for the Special Agent who had been in charge of preparing the criminal case against the petitioners and who had interrogated them (P.A. 170a-172a, 253a, 279a-283a, 292a, 370a).

5. Proceedings in the Court Below.

The Court of Appeals affirmed the judgments of the District Court entered after trials by jury.

The Court ruled that 18 U.S.C. § 1001 applied to petitioners' alleged conduct, and that proper standards of proof under 18 U.S.C. § 1001 had been applied (App. B, pp. 10a-14a). It also ruled that the 1957 agreement between the petitioners and the United States Attorney did

not constitute a binding statutory compromise under 26 U. S. C. § 7122(a), Internal Revenue Code of 1954; and that the Government was not estopped from prosecuting the petitioners by virtue of that agreement (App. B, pp. 14a-17a).

Petitioners' other contentions were rejected without discussion (App. B, p. 17a).

REASONS FOR GRANTING THE WRIT

I. The 1957 Agreement and its Repudiation

The convictions at bar were secured by a course of conduct which violates the trust of American citizens in the integrity of the Federal Government. The United States Government, after making an agreement with the petitioners on which they relied and acted, and after the acceptance of a sentence pursuant to that agreement, has proceeded, deliberately and methodically to repudiate its agreement.

This Court, in the discharge of its responsibility to formulate and apply standards for the conduct of prosecutions in the federal courts, should consider the important issues raised by the Government's repudiation.

The agreement involved was made during the 1957 discussions regarding settlement of the tax evasion indictments. The United States Attorney promised that, if McCue, Sr. would plead *nolo contendere* to misdemeanor charges, the indictment against McCue, Jr. would be dismissed and the charge that defendants made false statements to Special Agents of the Internal Revenue Service would not be prosecuted (P.A. 12a, 31a-32a, 39a, 99a-100a, 110a).

Pursuant to the agreement, McCue, Sr. pleaded *nolo contendere* to misdemeanor charges, and thereby subjected himself to the risk of imprisonment and substantial fines. He was fined $20,000, sentenced to jail for one year, execu-

tion of which was suspended and he was placed on probation for two years (P.A. 505a-506a).

The Department of Justice officials thereafter decided that they were disappointed and dissatisfied, disappointed with the results of the tax evasion prosecutions and dissatisfied with the way the United States Attorney handled the situation. The agreement was repudiated, first by a motion to vacate the judgment in McCue, Sr.'s case and then by the institution of these prosecutions. The Government's promise, the defendants' reliance on that promise, McCue, Sr.'s plea on the basis of that promise—all these, the Government proclaimed, meant nothing whatever.

If this "repudiation" is permitted to succeed—as it has succeeded until this point—there will certainly be spread the knowledge that there has been no "fastidious regard for the honor of the administration of justice," and that "the doing of justice" has not been made "so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124 (1956). We urge this Court to exercise its supervisory power over the administration of federal criminal justice to enforce minimal standards of honor and fair dealing in Government prosecutorial practices. *Ibid.*; *McNabb* v. *United States*, 318 U. S. 332 (1943); see also *Saldana* v. *United States*, 365 U. S. 646 (1961).

This question of fair standards is of grave and compelling significance. The case at bar raises a serious issue as to the power and dignity of United States Attorneys and the ability of the citizen to rely on agreements made by them.

When the Government deliberately repudiates such an agreement—on which defendants have relied—this breach weakens the fabric of trust between the individual and the Government. We think the question of whether this Court

should tolerate the practices by which the present convictions were obtained is, therefore, not only a question of decent prosecutorial practice and fair criminal procedure—it is a question which involves the integrity of the Government in its relationship with the citizen.

In affirming the judgments, the Court of Appeals did not discuss the paramount issue of whether fair standards of federal criminal justice required reversal. Although it did discuss and reject two related technical arguments—(i) that the agreement constituted a binding statutory compromise under 26 U. S. C. § 7122(a), Internal Revenue Code of 1954; and (ii) that the Government was estopped from bringing the present prosecutions by reason of its representations that no such prosecutions would be brought (App. B, pp. 14a-17a)—the court below failed to face the question: Will the federal courts tolerate such shabby promise-breaking by the Government after the promise was used to extract from one of the defendants a plea of guilty and the acceptance of punishment. This Court should not avoid that question.

No plausible justification for the Government's repudiation has ever been suggested. In the portion of the Court of Appeals opinion relating to the compromise and estoppel questions, several matters of fact are referred to which may have, in that court's mind, supported the repudiation. We submit that the matters referred to offer no such support.

(a) The court stated that at the time of the disposition of the 1957 tax evasion indictments, no mention was made to the District Court of the agreement between the Government and the defendants relating to the false statements charges (App. B, pp. 15a-16a). But the District Court was not asked to, nor was it required to, pass on the agreements; it was only asked to act on the then pending indictments. Nor, as the District Court itself has stated, did it

even purport to approve the agreement (P.A. 121a-122a, G.A. 13). We do not see how the failure of either side to inform the District Court of all of the terms of the agreement can justify the repudiation of that agreement by the Government.

(b) The court stated that the United States Attorney, in agreeing to accept McCue's plea of *nolo contendere* to misdemeanor charges under § 1451 a[illegible] was acting contrary to express instructions of the Department of Justice (App. B, p. [illegible]). But the court did not suggest—and the Government has never suggested—that the defendants or their counsel were aware of these instructions or were aware that the commitments of the United States Attorney would not be honored. The Justice Department's housekeeping headaches furnish no justification for repudiation. This Court should not permit the Government to exalt internal bureaucratic "regularity" over the liberties of the citizen.

From the point of view of these defendants and thousands of other defendants who deal each year with United States Attorneys, the United States Attorney is the Government. A United States Attorney, after all, is appointed directly by the President, 28 U.S.C. § 501, and may be removed from his office only by the President, 28 U.S.C. § 504; his powers are denned by statute; within his district it is his duty to "prosecute for all offenses against the United States." 28 U.S.C. § 507. When a citizen makes an agreement with the United States Attorney, it is reasonable for him to assume that he has made an agreement with the United States Government.

(c) Finally, there is a penumbra of suggestion in the opinion of the court below—much more explicit in the Government's brief below—of questionable behavior on the

part of the United States Attorney. For example, the court notes that when he appeared before the District Court on the 1957 tax charges, he

> "represented to the Court that there was considerable doubt whether a prosecution under § 145(b) could be successful. The overwhelming evidence of guilt presented in the present prosecution raises a question of how such a doubt could possibly have existed." (App. B, p. 16a).

We note that the "overwhelming evidence" in the present prosecution pertains to false statements—not to tax evasion, with which the United States Attorney was concerned at the time of the 1957 dispositions. Moreover, the "overwhelming evidence" was not presented until 1960, three years after the 1957 dispositions, a period of time during which the evidence was undoubtedly developed and refined.

But even if there were grounds for raised eyebrows over the United States Attorney's action, why should the defendants suffer for it? Or is the thought that the defendants exerted special influence on the United States Attorney—or corrupted him? Innuendoes to this effect can only be nonsense. If the Government had any real reason to believe in them, we may be sure that it would long ago have acted upon them. This Court should not permit the Government to prosecute the petitioners for alleged false statements if the real grievance against them lies elsewhere.

The record makes it abundantly clear that none of the foregoing factual matters constitute the primary reason for the Government's repudiation. That reason is a simple one, described in blunt terms by the Government's trial attorney in the proceedings in the District Court:

> "The Court: I don't think that the Department has ever blinked the fact that they were disappointed

with the result of the first prosecution, that is, 1957 indictment.

"Mr. Burke: I believe that is a matter of record in this court." (G.A. 38).

"Disappointment" is simply not a ground for repudiation.

In short, the repudiation of an agreement on which petitioners relied and acted remains a repudiation, the petitioners here stand sentenced to jail because of that repudiation, and all the innuendoes against the United States Attorney and defense counsel cannot obscure these facts. We respectfully suggest that this Court should come to grips with these facts and the grave and challenging questions they raise.

* * *

The Government's prosecutorial practices in the case at bar raise other serious questions for the administration of federal criminal justice.

Petitioners here have been prosecuted on the installment plan. At the time the Government undertook to prosecute them for alleged tax evasion with respect to travel reimbursement, fuel oil and well drilling transactions, the Government knew of the alleged false statements made by the petitioners to a Special Agent with respect to the same travel reimbursement, fuel oil and well drilling transactions (P.A. 38a, 89a). The petitioners, however, were indicted only for tax evasion. Two years later indictments for alleged false statements were forthcoming, resulting in the convictions at bar.

Federal and state courts and students of criminal law for some time have been deeply concerned about the dangers inherent in permitting prosecutors to bring multiple prosecutions of a defendant for separate crimes arising out of the same transaction. A. L. I. *Model Penal Code*, § 1.08(2) & Comments, Tent. Draft No. 5 (1956); *cf. Green* v. *United States*, 355 U. S. 184, 187-8 (1957).

The Government itself has occasionally expressed concern over the multiple prosecutions problem. The Government's Motion to Vacate the Judgment and Dismiss the Indictment, filed in *Petite* v. *United States*, 361 U. S. 529 (1960), stated:

> "It has generally been the policy of the Federal Government that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement. . . . The policy against multiple federal prosecutions is *a fortiori* to that against duplicating state-federal prosecutions, for there are more practical reasons why the Federal Government ought not to be foreclosed by the prior actions of the states than there are for separately prosecuting federal crimes." Government's Motion, pp. 3-4.

We submit that a policy limiting multiple prosecutions, if it is to be effective, must be a *judicially enforced rule*. The case at bar demonstrates the need for a rule which will not be vulnerable to undermining by administrative inaction or discriminatory interpretation. The discretion which Government prosecutors now possess—and which they used in the case at bar despite the policy expressed in *Petite* v. *United States*, *supra*—to multiply indictments poses a distinct threat to the basic rights of the citizen who incurs the displeasure of his Government. The supervisory power of this Court over the administration of criminal justice, we respectfully submit, requires this Court to deal with this serious departure from decent prosecutorial practices.

II. The Applicability of 18 U. S. C. § 1001 to Petitioners' Conduct

The court below has decided important questions of federal law which have not been, but should be, settled by this Court.

The petitioners were indicted, tried and convicted for making allegedly false statements to Special Agents of the Internal Revenue Service, in violation of 18 U. S. C. § 1001. The function of a Special Agent of the Internal Revenue Service is the investigation of alleged criminal violations of the tax laws. See, e. g., Treasury Regulations § 1.1118.6, 26 Fed. Reg. 6393, July 15, 1961 (6 CCH Fed. Tax Rep. ¶ 5988 at p. 67,087); Paragraph 678, Internal Revenue Agent's Manual of Instructions (quoted in *United States* v. *Lipshitz*, 132 F. Supp. 519, 521 [E. D. N. Y. 1955]); *United States* v. *Guerrina*, 112 F. Supp. 126 (E. D. Pa. 1953), *mod. on other grounds*, 126 F. Supp. 609 (E. D. Pa. 1955). On the other hand, the function of a Revenue Agent of the Internal Revenue Service is to assist in the determination of civil tax liability. "It should be remembered that Special Agents are detectives rather than tax adjusters." Krekstein, *Civil Settlement of Fraud Cases*, in 8th N. Y. U. Institute on Federal Taxation, 269, 270 (1950).

In the case at bar, the Special Agent in charge of interrogating the defendants testified that he was performing this very function of criminal investigation (P.A. 434a-435a). The alleged false statements were answers to questions posed as part of an investigation which subsequently led to indictment of both defendants for income tax evasion (P.A. 161a, 451a-452a, 14a-18a).

Petitioners contend that 18 U. S. C. § 1001 does not make it a crime for a suspect to give a false exculpatory answer to a criminal investigator preparing a case against

him, that the legislative history and judicial interpretation of § 1001 establish that it was intended only to punish statements and representations which pervert the administrative functioning of Government offices. This issue has never been decided by this Court. We submit that there is a compelling need for such a decision. The consequences of the decision of the court below in affirming convictions of suspects indicted for lying to criminal investigators are enormous for the administration of federal criminal law and procedure:

First, the Court of Appeals has blessed the use of 18 U. S. C. § 1001 as an instrumentality for converting almost every criminal prosecution into a double prosecution. First, allege the crime. Second, allege that somewhere along the line the accused violated § 1001 when, as a suspect, he denied his guilt. Let it not be thought that Government prosecutors will hesitate to use § 1001 in this manner? *United States* v. *Stoffey*, 279 F. 2d 924 (7th Cir. 1960).

Second, the Court of Appeals has encouraged the practice of multiple prosecutions of related crimes, a practice which offends the first principles of decent criminal procedure. If the Government dislikes the sentences handed out after conviction, it can prosecute the defendant a second time for his attempt to exculpate himself.

With grim thoroughness, the case at bar displays both of the foregoing vices—and others—that result from placing this statute, expanded by the Court of Appeals decision, in over-zealous hands.

(a) The offense of tax evasion for which the petitioners had previously been indicted in 1957, has become two offenses, tax evasion plus lying to criminal interrogators. The 1957 tax evasion indictments were based, at least in part, on the same matters concerning which the petitioners were alleged to have made false statements in the present prosecutions.

(b) The use of § 1001 permitted the Government to have two swings at these petitioners by bringing a separate prosecution for an offense which could have been joined with the original charges but which the Government elected to try two years later—because it was dissatisfied with the results of the first prosecution.

(c) With the addition of a § 1001 charge, the total potential liability for each defendant swelled from 10 years and $20,000 (under the original tax evasion indictment) to 25 years and $50,000 (under both indictments).

(d) When the present prosecutions were brought, the statute of limitations had run with respect to both of the tax returns on which the prior indictments had been brought, but a prosecution for alleged false statements relating to those returns was not barred.

We cannot believe that Congress meant to write these distortions into the federal criminal law and procedure.

Moreover, petitioners here were prosecuted for alleged lies told under oath. Nevertheless, the evidential requirements for a conviction for perjury were not applied to the present prosecutions. By changing the name of the crime from "perjury" to "false statements," the Government attempted to avoid the requirements of the "two-witness" rule—requirements which this Court refused to discard for perjury prosecutions in *Weiler v. United States*, 323 U. S. 606 (1945).

Finally, the court below has sanctioned what is perhaps the gravest consequence of the application of § 1001 to criminal interrogations: the distortion it represents in the traditional relationship between a citizen and the Government. A citizen certainly is obliged to avoid affirmative deception of a Government agency so as to pervert its normal administrative functioning. But where his utterances do not have this fraudulent effect upon the process of Government, the falsity of an answer is an affront only to the

Government agent who poses the question. Must a citizen speak truthfully to a detective merely because of his official status as a detective? We have, it is hoped, come too far along the road in the development of our national traditions to entertain any notion that a citizen owes an allegiance of fidelity to an individual Government criminal investigator for the breach of which he must be sent to jail.

The decision below finds no support in the relevant authorities. Legislative history and judicial precedent demonstrate that § 1001 was not intended as a general anti-lying statute, that its scope was limited to the statements and representations which pervert the administrative functioning of, and which affirmatively mislead, Government offices. S. Rep. No. 1202, 73d Cong., 2d Sess. (1934); *United States* v. *Gilliland*, 312 U. S. 86, 93 (1941); *United States* v. *Bramblett*, 348 U. S. 503, 507 (1955).

Three District Court decisions have carefully analyzed the legislative history of § 1001 and have concluded that the statute does not apply to answers given by a suspect in response to criminal interrogation. *United States* v. *Philippe*, 173 F. Supp. 582 (S. D. N. Y. 1959) (interrogator was Special Agent of the Internal Revenue Service); *United States* v. *Stark*, 131 F. Supp. 190 (D. Md. 1955) (interrogators were Special Agents of the FBI); *United States* v. *Davey*, 155 F. Supp. 175 (S. D. N. Y. 1957) (interrogator was FBI agent). These decisions reasoned that "the refusal of a suspect to affirmatively assist a criminal investigator in preparing a case for criminal prosecution against himself has no tendency to pervert the investigator's function," *United States* v. *Philippe*, *supra*, at 584, and that because a criminal investigator does not have "the power to decide whether a criminal offense has been committed," his interrogation of a suspect is "not within the jurisdiction of [a Government

agency] within the meaning of that phrase as contained in section 1001." *United States* v. *Stark*, *supra*, at 207. An identical conclusion has been reached by the Court of Military Appeals when construing § 1001's counterpart in the Uniform Code of Military Justice. E.g., *United States* v. *Ironson*, 8 U. S. C. M. A. 525 (1957); *United States* v. *Geib*, 9 U. S. C. M. A. 392 (1958); *United States* v. *Thomas*, 10 U. S. C. M. A. 54 (1958).

In affirming the judgments of conviction, the court below failed to deal with the issue that had been presented to it. Nowhere in its discussion of 18 U. S. C. § 1001 did the court either mention that the interrogations of these petitioners were conducted exclusively by Special Agents or even refer to the distinction between such Agents and Revenue Agents.

We also suggest that it was the failure to appreciate the true nature of the interrogations at bar that led the court below to state that "the overwhelming weight of judicial authority" supported "applicability of the statute to the defendants' conduct" (App. B, p. 13a). If the court had recognized that the "defendants' conduct" here consisted of answers to criminal interrogation, the court could not have made this statement. From the "overwhelming weight" of judicial authority, the court did not cite a single case upholding the application of § 1001 to answers made in response to criminal interrogation.

The cases in this Court cited below deal with wholly unrelated problems of statutory interpretation. For example, in *United States* v. *Gilliland*, 312 U. S. 86 (1941), the issue was whether § 1001 was limited to statements and representations involving pecuniary or property loss to the Government. The issue in *United States* v. *Beacon Brass Co.*, 344 U. S. 43 (1952), was whether oral misrepresentations constituting a willful effort to evade taxes could be prosecuted under § 145(b), Internal Revenue Code of 1939.

The cases in the Court of Appeals "which have upheld convictions of taxpayers under Section 1001 for making false statements to revenue agents" (App. B, p. 12a) are also irrelevant, for "revenue agents" are not criminal investigators; as stated above, their sole function is to determine how much tax is owed the Government.

Whatever the Court of Appeals thought it was deciding, the hard fact is that it has affirmed the convictions of suspects who were indicted for lying to criminal investigators.

We have already noted the consequences of this fact. We submit that the issue of the applicability of § 1001 to responses to criminal interrogation is of compelling significance and should be considered by this Court.

* * * *

The court below has decided a second issue of statutory interpretation with respect to § 1001 which should be settled by this Court.

Petitioners' alleged false statements were oral. The legislative history of § 1001, however, demonstrates that Congress did not intend to punish oral utterances under § 1001.

The present version of 18 U. S. C. § 1001 was passed by Congress in 1934 in order to meet the problems faced by the Interior Department following this Court's decision in *United States* v. *Cohn*, 270 U. S. 339 (1926). There this Court held that § 35 of the Criminal Code (False Claims Act)* covered false statements and representations result-

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* *The False Claims Act has its origin in the Act of March 2, 1863, 12 Stat. 696, which was aimed at punishing frauds upon the Government of the United States and which made it a crime to use

> "any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry,"

in order to obtain "the approval or payment of [a false] claim. . . ." In 1874, this Act became § 5438, Revised Statutes, and in 1909 it became § 35 of the Criminal Code. 35 Stat. 1088, 1095.

ing in pecuniary or property loss to the United States but did not cover "defrauding" used in the

> "secondary sense of interfering with or obstructing one of its lawful governmental functions by deceitful and fraudulent means." *Id.* at 346.

This interpretation impaired the Interior Department's efforts to enforce the Code of Fair Competition for the petroleum industry and the so-called "Hot Oil" regulations issued under § 9(c), National Industrial Recovery Act, 48 Stat. 195, 200 (1933), controlling shipment of oil in interstate commerce in excess of state production limitations. Because monetary fraud was not involved, the *Cohn* case prevented prosecution of persons falsifying reports required under the Code or "Hot Oil" regulations. For the same reason, the Interior Department's Public Works Administration could not prosecute those contractors who filed false statements of wages paid.

On February 7, 1934, Secretary of Interior Ickes wrote to the Senate and House Judiciary Committees setting forth the difficulties of the Interior Department in connection with the "Hot Oil" regulations and the Public Works Administration. The Secretary stated:

> "There is transmitted herewith a draft of a proposed bill providing a penalty for the presentation of a false *written* instrument relating to any matter within the jurisdiction of the Secretary of the Interior [and other related agencies]." 78 Cong. Rec. 2859. (Emphasis supplied.)

The False Claims Act was amended in 1918 to prohibit, under a single penalty clause and in the same sentence, false and fraudulent statements or representations "with the intent of cheating and swindling or defrauding the Government"; theft of Government property; conspiracy to defraud the Government by obtaining payment of a false claim; and delivery of United States property, or the giving of false receipts for such property, pursuant to a fraudulent scheme. 40 Stat. 1015.

In the Senate, the bill was adopted with an amendment extending its coverage to all departments and agencies. The Senate version was intended to exclude oral utterances. The Senate Judiciary Committee reporting the bill favorably, described it as a bill

> ". . . to provide a penalty for the presentation of a false *written* instrument." S. Rep. No. 288, 73d Cong., 2d Sess. (Emphasis supplied.)

See also 78 Cong. Rec. 2859.

Events on the House side were even more revealing with respect to the exclusion of oral utterances. The House Judiciary Committee reported the bill out with three amendments accepted by the full House:

(a) One extended the bill to all departments and agencies.

(b) A second added the test of "intent to defraud the United States," which was later to result in a veto.

(c) A third added the word "statement," so as to make the bill prohibit

> ". . . any false or fraudulent affidavit, declaration, *statement*, certificate, voucher, or paper or writing purporting to be such. . . ." See 78 Cong. Rec. 3724. (Emphasis supplied.)

Despite the House's addition of the word "statement"—which, of course, appears in the present 18 U. S. C. § 1001 as well—the House clearly intended the bill to apply only to written instruments.

In the first place, the Judiciary Committee, in reporting out the bill with the added word "statement," described the bill as a bill which made it an offense

> ". . . to present any false *written* instrument relating to any matter within the jurisdiction of any department or agency of the Government or corpora-

tion owned or controlled in whole or in part by the United States." H. Rep. No. 829, 73d Cong., 2d Sess. (Emphasis supplied.)

Second, on the floor of the House, the following colloquy immediately preceded House passage of the bill:

"*Mr. Eltse of California*: Reserving the right to object, I should like to ask if this is limited to written instruments?

"*Mr. McKeown* [Member of the Judiciary Committee]: It is. All instruments or contracts or representations in writing.

"*Mr. Eltse of California*: It does not provide for false verbal testimony, then?

"*Mr. McKeown*: No. That would be a different offense. Does the gentleman mean if a man makes a false representation orally?

"*Mr. Eltse of California*: If he appears before any board or commission or agency or administration, as it is provided in this bill, and gives testimony that is false, why should it not apply to him just the same as it does the man who makes a written bid?

"*Mr. McKeown*: The trouble is, there is always a dispute as to whether he said it or whether he did not, but when he puts it on paper there is no dispute about it.

"*Mr. Eltse of California*: As a matter of fact, is there not more proof offered by way of verbal testimony than by these written documents?

"*Mr. McKeown*: The offense charged is if he signed a written document.

* * * * *

"*Mr. Eltse of California*: If you are going to make the bill effective, why do you not extend it to verbal testimony?

"*Mr. McKeown:* It is an unheard-of proposition to try to convict a man for a mere statement unless he has testified under oath. If he has testified under oath, then there is a penalty provided for, that.

"*Mr. Eltse of California:* As a matter of fact, are not all of these witnesses who appear before these boards and commissions sworn?

"*Mr. McKeown:* If they make a false statement, they are liable to punishment now, under the perjury law." 78 Cong. Rec. 3724.

The House passed the bill as amended and the Senate acquiesced in all House amendments.

The President vetoed the legislation, however, on the ground that the "with intent to defraud" condition added by the House made the bill apply to offenses already covered by § 35 of the Criminal Code (False Claims Act), which carried a heavier penalty—a duplication which would "reduce the punishment for certain frauds against the United States." 78 Cong. Rec. 6778-9.

The result of the veto was a second letter to the Senate Judiciary Committee from the Secretary of Interior on May 2, 1934, transmitting a bill described as penalizing

". . . knowing or willful presentation of any false *written* instrument relating to any matter within the jurisdiction of any department or agency of the Government." Letter reproduced in Appendix B, Government's Brief in the Supreme Court, *United States v. Gilliland*, 312 U. S. 86 (1941). (Emphasis supplied.)

The bill was referred by the Senate to its Judiciary Committee. 78 Cong. Rec. 7969. Before it could be acted on, however, the Senate received and referred to the Judiciary Committee a House amendment of the False Claims Act

designed to penalize intentional damage to Government property. 78 Cong. Rec. 8154.

When the Senate Judiciary Committee once more reported out legislation to meet the Interior Department's request, it simply tacked on to the House amendment of the old False Claims Act additional language used earlier in the vetoed bill and designed to meet the Interior Department's problems.

Yet there is not a solitary suggestion in reports or debates that the use of the False Claims Act as the framework for the new prohibition represented other than a legislative short-cut by which to achieve precisely the same result Congress and the Interior Department had earlier been attempting to reach. The False Claims Act, after all, was a natural vehicle: it prohibited the same general type of conduct and was already the subject of a House approved amendment awaiting Senate action.

In particular, there is not a solitary suggestion that the Senate Judiciary Committee's action represented any shift away from the previous and repeatedly expressed intention of both houses and of the Interior Department to punish only deceptive writings. See S. Rep. No. 1202, 73d Cong., 2d Sess. (1934).

The Judiciary Committee's proposal was adopted by the Senate, passed by the House, and approved by the President without further change. 78 Cong. Rec. 11270-1, 11513.

We submit that the applicability of § 1001 to oral utterances should be considered by this Court in the light of this legislative history.

III. Non-recording of Grand Jury Testimony.

When McCue, Jr., the first of the petitioners to be tried, requested the District Court to examine the Grand Jury testimony of certain witnesses, it was disclosed that none

of the testimony before the 1957 tax evasion grand jury had been recorded* and that the testimony before the 1959 false statements grand jury of the Special Agent who had been in charge of preparing the criminal case against the defendants and who had interrogated them had similarly gone unrecorded (P.A. 170a-172a, 253a, 279a-283a, 292a, 370a).

The non-preservation of the Special Agent's testimony in 1959 was not merely oversight or an idiosyncratic prosecutorial decision. Government counsel at McCue, Jr.'s trial stated:

> "For the benefit of the Court of Appeals, in view of counsel's statement, I will state that it is the rule that in presenting tax cases the special agent's testimony is not considered necessary to report, and we made no special exception for this case." (P.A. 292a).

Whose rule? Not a rule of any court of which we are aware. It is apparently a "rule" of Government prosecutors by which they systematically grant the Treasury's Special Agents special protection from impeachment.

This Court has never considered whether a Government prosecutor has a limitless discretion to record or not to record grand jury testimony. But this Court has held that there are occasions when a trial court may in its discretion order grand jury testimony produced for a defendant's use in his cross-examination of prosecution witnesses. E.g., *Pittsburgh Plate Glass Co. v. United States*, 360 U. S. 395, 400 (1959). The Second Circuit has implemented the foregoing rule by holding that the defense has a right to have the trial court itself first examine the grand jury transcripts

*The trial court did not question "the right to turn over to [defense counsel] anything that might appear as a contradiction in those cases [the 1957 cases] that are certainly closely allied to this one." (P.A. 281a). However, nothing having been recorded, there was nothing to turn over.

for inconsistencies. *United States* v. *Zborowski*, 271 F. 2d 661 (2d Cir. 1959); *United States* v. *Spangelet*, 258 F. 2d 338 (2d Cir. 1958); *United States* v. *Hernandez*, 290 F. 2d 86 (2d Cir. 1961); *United States* v. *Giampa*, 290 F. 2d 83 (2d Cir. 1961). In addition, the Second Circuit has held that the defense has a right to have a Court of Appeals read the transcript to determine whether access to grand jury testimony should have been granted. *United States* v. *Zborowski*, *supra*; *United States* v. *Spangelet*, *supra*.

These rights—availability of grand jury testimony to defendants where prior testimonial inconsistencies exist, inspection by the trial court with respect to inconsistencies, and review by the Court of Appeals of the trial court rulings—are designed to preserve the defendants' opportunity to impeach. And the ability to impeach is a classic and essential method of exercising the constitutional right of confrontation of witnesses. All of these rights are rendered valueless to a defendant when grand jury testimony is not recorded.

Accordingly, we do not believe that the Government prosecutors have limitless discretion to record or not to record grand jury testimony. Otherwise, if the prosecutor wishes to preclude impeachment of a selected grand jury witness, all he needs to do as the witness approaches the stand is to excuse the stenographer from the grand jury room.

A prosecutorial decision not to record becomes particularly objectionable when it systematically selects Government agents for protection against impeachment. This issue is particularly significant, inasmuch as the Government's non-recording "rule" for Treasury Special Agents appears to be of general applicability in the federal courts.

We submit this Court should determine whether civilized standards of procedure in the federal courts were violated by the failure to record in the case at bar.

IV. The Vagueness of the Question Asked by the Special Agent.

In *Nowak* v. *United States*, 356 U. S. 660 (1958), the Supreme Court held that it was "not implausible" for petitioner to have understood the second part of the following question as referring solely to membership in an anarchistic organization and not to membership in an organization teaching overthrow of the Government:

> "'28. Are you a believer in anarchy? . . . Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? . . .'" *Id.* at 663.

On this ground the Court held the second part of the question "too ambiguous to sustain" a charge of fraudulent procurement of naturalization, *id.* at 665, and it accordingly reversed the concurrent findings of the lower courts.

Similarly, in *United States* v. *Profaci*, 274 F. 2d 289 (2d Cir. 1960), the Second Circuit, reversing the district court's revocation of Profaci's naturalization, wrote:

> "Even if it were sufficiently proved that Profaci was specifically asked, 'Were you ever arrested?' the Government's proof does not convincingly demonstrate that the defendant actually understood the question to refer to arrests outside the United States, and especially to those preceding his hearing by more than five years." *Id.* at 292.

We submit that there are alternative interpretations of the critical question asked of McCue, Sr. in the case at bar that are no less plausible than Nowak's interpretation of his question and that the question asked of McCue, Sr. is no less ambiguous than the questions asked of Nowak and Profaci.

The relevant portion of the transcript of McCue, Sr.'s interrogation dealing with the well drilling item is as follows:

> "Q. Who negotiated to have the work [the well drilling] done?
>
> A. Jack McCue.*
>
> Q. Was he told to have it done?
>
> A. No, he done a lot of things of all things. He was at my home with people, with customers, at meetings. I presume he did.
>
> Q. You didn't have a thing to do with it?
>
> A. Not a thing." (P.A. 437a).

The alleged false statement is the last answer, "Not a thing." The Government's contention is that the last question means, "You didn't have a thing to do with the work done" and the last answer means: "I didn't have a thing to do with the work done." Thus, for the word "it" the Government substitutes the phrase "the work done" (P.A. 530a-531a).

The Government's interpretation overlooks the first question in the exchange quoted above: "Who negotiated to have this work done?" *Negotiation* was the topic, and when the agent thereafter said, "You didn't have a thing to do with it," the "it" seems at least equally (indeed we think probably) referable to *negotiation* for the work. The critical question, "You didn't have a thing to do with it," was preceded by the answer, "I presume he did"—a reference to negotiation.

The record affirmatively shows that McCue, Sr. had nothing to do with negotiating to have the well work done (P.A. 459a-460a, 463a-464a, 519a-520a, 531a). Indeed, the trial court recognized that only under the Government's interpretation of "it" was there any evidence of falsity, for the court instructed the jury that in order to convict on

*Brother of McCue, Sr.

this count of the indictment, the jury would have to find, among other things, "that the defendant in his answer did not intend to indicate only that he had nothing to do with negotiations. . . ." (P.A. 533a).

Accordingly, since the Government's interpretation was "no more valid than others equally supported by reason and experience," *United States* v. *Bufalino*, 285 F. 2d 408, 419 (2d Cir. 1960), it was error to allow the case to go to the jury. The questions involved in a criminal false statements prosecution should be measured against at least as high a standard of unambiguity as the questions involved in the denaturalization proceedings brought against Nowak and Profaci.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Judgments of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of March one thousand nine hundred and sixty-two.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES O. MCGEE, JUNIOR,
Defendant-Appellant.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the

District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED MARCH 20, 1962
A. DANIEL FUSARO, CLERK

Judgments of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of March, one thousand nine hundred and sixty-two.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES O. McCUE, SENIOR,
Defendant-Appellant.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the

District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED MARCH 20, 1962
A. DANIEL FUSARO, CLERK

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 27 and 28—September Term, 1961

Argued December 15, 1961 Decided March 20, 1962.

Docket Nos. 26093-4

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

JAMES O. McCUE, JR.,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

JAMES O. McCUE, SR.,
Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
MOORE and HAYS, *Circuit Judges.*

Appeals from judgments of conviction under 18 U. S. C. § 1001, for making false statements and representations to agents of the Internal Revenue Service, entered after trials

by jury in the United States District Court for the District of Connecticut, Robert P. Anderson, *Judge*.

Affirmed.

JOHN P. BURKE, Washington, D. C. (John B. Jones, Jr., Acting Assistant Attorney General, Joseph M. Howard, Eldon F. Hawley, Attorneys, Department of Justice, Richard B. Buhrman, Attorney, Internal Revenue Service, on the brief), *for plaintiff-appellee*.

SIMON H. RIFKIND, of Paul, Weiss, Rifkind, Wharton & Garrison, New York, N. Y. (John G. Simon, Allan L. Blumstein, of counsel, and George F. Lowman, Cummings & Lockwood, and Francis J. McNamara, of Stamford, Conn., on the brief), *for defendants-appellants*.

HAYS, *Circuit Judge*:

Defendants appeal from judgments of conviction entered after separate trials, upon jury verdicts finding them guilty under 18 U. S. C. § 1001[1] of making false statements to Special Agents of the Internal Revenue Service. McCue, Jr., who was convicted on two counts, was fined $5000 and sentenced to one year in prison on each count, the terms

[1] § 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

to run concurrently and to be suspended after service of four months, after which he is placed on probation for one year. McCue, Sr., who was convicted on one count, was fined $5000 and sentenced to one year in prison, with the same provision for suspension after four months and for a year's probation. We affirm the judgments.

The McCues, father and son, were respectively President and Vice-President of the Stamford Rolling Mills Company, a corporation operating a plant for the rolling of strip copper and brass at Springdale, a suburb of Stamford, Connecticut. All of the stock of the corporation was owned by the McCue family and family trusts, McCue Sr. owning between seventy and eighty percent of the common stock.

Sometime prior to 1952 the Internal Revenue Service undertook an investigation of the tax returns of the McCues and of the Company which eventually covered the years 1946 to 1952. From 1952 onward this investigation was in the immediate charge of Special Agent Richard Baker.

I. McCue, Sr.

On August 13, 1954, McCue, Sr., having volunteered to do so, appeared before the Treasury agents who were conducting the investigation, and testified under oath. In the course of the examination McCue, Sr. was questioned with regard to a water well which was drilled on property owned by him and occupied as a home, and which was paid for by the Company. He testified that negotiations for the work on the well were carried on by one Jack McCue, his brother, who had acted on his own initiative and without orders from McCue, Sr. When McCue, Sr. was asked: "You didn't have a thing to do with it?", he replied, "Not a thing."

The one count of the indictment on which McCue, Sr. was convicted was based upon the falsity of this answer. There was ample evidence of falsity. This evidence established that McCue, Sr. had in fact on several occasions discussed his need for more water with Downey, the purchasing agent of the Company, and sometime late in 1950 or early in 1951, in his own office and in the presence of McCue, Jr. had instructed Downey to have wells drilled on his property and on the property occupied as a home by McCue, Jr. Downey engaged the services of a company in the business of drilling wells and the two wells were drilled. Downey discussed with McCue, Sr. certain difficulties which were encountered in the course of drilling the wells. The well on the property of McCue, Sr. was about three hundred feet from his house and the derrick used in drilling it was about forty or fifty feet high. The drilling equipment makes a noise like a pile driver.

The bills for drilling the wells were paid by the Company and charged to "Repair Expenses," which were taken as a deduction in the corporate income tax return.

Jack McCue had nothing whatever to do with the well drilling or the negotiations, and the men in charge of the drilling had never even heard of him.

2. McCue, Jr.

On August 31, 1954, McCue, Jr. appeared voluntarily before the Treasury agents and was examined under oath by Special Agent Baker. He was questioned about certain travel vouchers, i.e. vouchers for reimbursement by the Company of the expenses of trips made on company business. Special Agent Baker asked him specifically: "Were you at all times at the places shown on the dates shown on these memos?" McCue, Jr. replied: "Yes. To the best of my knowledge we were; yes."

The falsity of this answer was the basis for the first of the two counts on which McCue, Jr. was convicted. The evidence amply establishes its falsity. The Government was able to show from corporate records, including the gatemen's books, cafeteria slips and telephone toll slips and from the records of the McCues' country club that they were in fact at the plant or nearby on the dates on which, according to the travel vouchers, they purported to be in other cities.

In the course of the same examination of August 31, 1954, McCue, Jr. was also asked about the wells drilled at Company expense on his and his father's property. The questions and his answers were:

> "Q. Who negotiated to have this well drilled at your place? A. I haven't any idea, not even to this day.
>
> Q. Who paid for the well drilling operation? A. I don't know.
>
> Q. Did you? A. No, sir. I didn't need it. I didn't want it. I didn't authorize it, and knew nothing about it."

The falsity of these answers was the basis for the second count on which McCue, Jr. was convicted. The evidence amply established their falsity. McCue, Jr. ordered the well drilled, examined, discussed and accepted the proposal provided by the firm engaged for the work, and ordered them to undertake it. He was kept informed of the work on the well as it proceeded and discussed its progress with drillers. He went with them to choose a spot on his property for drilling the well. As with his father the location of the well drilling equipment, its size and the noise of the operation make it impossible that he was unaware that a well was being drilled on his property.

1.

Section 1001

Appellants urge that Section 1001 is not applicable to the conduct for which they were convicted.

Analysis of the Section reveals no ambiguity. The elements of the offense are 1) a statement, 2) falsity, 3) that the false statement be made "knowingly and willfully," and 4) that the false statement be made in a "matter within the jurisdiction of any department or agency of the United States." See *United States* v. *Silver*, 235 F. 2d 375 (2d Cir.), cert. denied, 352 U. S. 880 (1956).

However, in spite of what would appear to be the plain meaning of the statute, we are pressed by appellants to consider the legislative background. It is said to be significant that the statute in its present form resulted from amendment of a previous statute[2] which was designed particularly to punish the presentation to the government of false and fraudulent claims. The legislative history of the present statute as it was originally enacted in 1934 is very scanty. It shows that among the reasons for the amendments which were then adopted were the prevention of false reports on shipments of "hot oil" and false statements of wages paid on Public Works Administration projects.[3] The legislative history does not suggest that the purpose of the amendment was in any way intended to be confined to the specific situations which were mentioned. The very broad language of the amendment suggests that these situations were merely cited as examples of the kind of conduct which the statute was designed to prohibit. And the quite different character of the two examples which were given

[2] 40 Stat. 1015 (1918).

[3] S. Rep. No. 1202, 73d Cong., 2d Sess. 1 (1934), 78 Cong. Rec. 11270 (1934).

may also be taken as representing the broad application intended for the statute.

> "A greater variety of false statements were meant to be included. There is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted." *United States* v. *Bramblett*, 348 U. S. 503, 507 (1955).

The main thrust of appellant's argument with respect to Section 1001 is that the Section is intended to protect the processes of government from interference and obstruction and not to require "the citizen to speak truthfully to police officers."

There is no reason to believe that the administration of the tax laws and the collection of taxes is not one of the processes of government which the statute was designed to protect, or that making false statements about taxes to the representatives of the Treasury is not the kind of interference and obstruction which the statute was intended to prevent.

The case of the citizen who replies to the policeman with an "exculpatory no" can be left until it arises. See *United States* v. *Dacey*, 155 F. Supp. 175 (S. D. N. Y. 1957); *United States* v. *Stark*, 131 F. Supp. 190 (D. Md. 1955). It is sufficient for the present to point out that the case at bar bears no resemblance to such a situation. Here the appellants voluntarily appeared before three representatives of the Treasury under circumstances in which they were well aware of the nature and purpose of the examination. They were accompanied by counsel and they were questioned under oath. It does not seem to us that a statute which requires truthful answers in such a situation tends in any way "to distort the relationship in this country be-

tween a citizen and his government," as the appellants would have us believe.

The great weight of judicial authority supports the applicability of Section 1001 to the circumstances of the present case. The recent cases in which the Supreme Court has concerned itself with the Section contain no suggestion of confining the effect of the statute to any smaller area than that encompassed by its own broad language. On the contrary there are indications that the Court rejects any theory of narrow applicability.

> "The [1934] amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction." *United States v. Gilliland*, 312 U. S. 86, 93 (1941).

In *United States v. Beacon Brass Co.*, 344 U. S. 43, 46 (1952), the Court referred to Section 1001 as "a statute specifically outlawing all false statements in matters under the jurisdiction of agencies of the United States."

See also *United States v. Bramblett, supra.*

In *Cohen v. United States*, 201 F. 2d 386, 392 (9th Cir.), cert. denied, 345 U. S. 951 (1953), the Court of Appeals for the Ninth Circuit characterized Section 1001 as

> "a statute based upon the broad public policy against the making of false statements in *any* matters within the jurisdiction of *any* department or agency of the United States." (Emphasis in the original.)

Among the cases which have upheld convictions of taxpayers under Section 1001 for making false statements to revenue agents are: *United States v. Brott*, 204 F. 2d 433

(2d Cir.), cert. denied, 359 U. S. 985 (1959); *Cooper* v. *United States*, 282 F. 2d 527 (9th Cir. 1960); *United States* v. *Clancy*, 276 F. 2d 647 (7th Cir. 1960), rev'd on other grounds, 365 U. S. 312 (1961); *Smith* v. *United States*, 257 F. 2d 133 (10th Cir. 1958); *Knowles* v. *United States*, 224 F. 2d 168 (10th Cir. 1955).

The only case to which we have been cited which supports a contrary result is *United States* v. *Philippe*, 173 F. Supp. 582 (S. D. N. Y. 1959). We reject the reasoning and the result in that decision.

We conclude that the conduct of the defendants falls clearly within the express language of the statute, that there is nothing in the legislative background of the statute to indicate that the statute was not intended to apply to the defendants' conduct, and that the applicability of the statute to the defendants' conduct is supported by the overwhelming weight of judicial authority.

The appellants' contention that Section 1001 does not apply to oral statements is disputed by the language of the statute itself which penalizes the making of "any false, fictitious or fraudulent statements" as well as the making or using of "any false writing or document." *See United States* v. *Beacon Brass Co., supra*, at p. 6; *Cooper* v. *United States, supra*; *Smith* v. *United States, supra*; *Varzani* v. *United States*, 168 F. 2d 133 (D. C. Cir.), aff'd by an equally divided court, 335 U. S. 895 (1948); *United States* v. *Zavala*, 139 F. 2d 830, 831 (2 Cir. 1944).

The appellants' other contentions with respect to Section 1001 are equally without merit. Not having raised the point in the lower court, the appellants cannot now rely on the two-witness rule. In any event the rule has been held to be inapplicable to prosecutions under Section 1001. *Fisher* v. *United States*, 254 F. 2d 302 (9th Cir.), cert.

denied, 358 U. S. 895 (1958); *United States* v. *Killian*, 246 F. 2d 77 (7th Cir. 1957); *Todorow* v. *United States* 173 F. 2d 439 (9th Cir.), cert. denied, 337 U. S. 925 (1949). Even if there is a separate requirement of "materiality," and we held in *United States* v. *Silver*, 235 F. 2d 375 (2d Cir.), cert. denied, 352 U. S. 880 (1956) that there is not, the false statements involved in the present case were clearly material to the investigation.

II.

Compromise and Estoppel

The appellants were indicted in 1957 for tax evasion in violation of Section 145 (b) of the Internal Revenue Code of 1939. There followed a series of conferences between counsel for appellants and the United States Attorney. As a result of these conferences it was agreed that McCue, Sr. would plead *nolo contendere* to charges under Section 145 (a) (misdemeanor), and that the United States Attorney would recommend acceptance of that plea and dismissal of the indictment against McCue, Jr. While the exact confines of the agreement were never clearly defined, it may be assumed, for our purposes, that both the United States Attorney and counsel for defendants understood that the offenses which are the subject of the present prosecution were to be included in the agreed upon disposition of the matter.

Immediately after the conclusion of the final conference the attorneys appeared before Judge Anderson in the District Court. Judge Anderson, after hearing the representations of the United States Attorney, accepted the *nolo contendere* plea of McCue, Sr. and dismissed the indictment against McCue, Jr. McCue, Sr. was fined $20,000, sentenced to one year of imprisonment with execution suspended and placed on probation for two years.

The appellants urge that these proceedings constituted a statutory compromise of their liability[4] and also that the government was estopped, by reason of the proceedings, from prosecuting them under Section 1001. Since the offense for which McCue, Sr. was punished was the filing of false and fraudulent tax returns for 1951 and 1952, while the present prosecution is for making false statements in 1954, the additional plea of double jeopardy can be dismissed without comment.

Under the circumstances as they then existed, any compromise, whether statutory or other, required the concurrence of the District Judge, since he was obliged to pass upon the propriety of accepting McCue, Sr.'s plea of *nolo contendere* and the dismissal of the indictment as to McCue, Jr. Yet no mention of any compromise was made to Judge Anderson. The false statements which are the basis for the present prosecution were not referred to at any time in the course of the proceedings before Judge Anderson, and, of course, the indictments which were the subject of those proceedings did not include or have any relevance to the false statements for which McCue, Sr. and McCue, Jr. have been convicted in the present case.

As Judge Anderson said:

> "Moreover, the defendants are themselves barred from raising the issue of an estoppel based upon the claimed agreement because the carrying out of the agreement involved the dismissal of two indictments which necessitated action by the court. Under these circumstances the court is entitled to a full and complete disclosure of all of the circumstances surrounding the motion for dismissal. It is apparent from the face of the record and the defendants' claims that

[4] 68 A. Stat. 847 (1954), 26 U. S. C. § 7122 (a) (1958).

there was not disclosed to the court, at the time the motion was made to dismiss the indictments, two features of the agreement which would have vital consequences: first, that McCue, Sr. had agreed to submit himself to punishment, both for himself and for McCue, Jr., and, second, that the U. S. Attorney had agreed to grant plenary immunity from prosecution on any and all charges which might be derived from the investigative file." *United States* v. *McCue*, 178 F. Supp. 426, 437 (D. Conn. 1959).

There were certain other aspects of the case of which Judge Anderson was also not aware. The United States Attorney represented to the Court that there was considerable doubt whether a prosecution under § 145 (b) could be successful. The overwhelming evidence of guilt presented in the present prosecution raises a question of how such a doubt could possibly have existed. Before entering into the supposed agreement to accept McCue, Sr.'s plea of *nolo contendere* to misdemeanor charges under § 145 (a) the United States Attorney had requested of the Department of Justice permission to prosecute the case as a misdemeanor under § 145 (a) rather than as a felony under § 145 (b), and such permission had been firmly refused. In agreeing to accept McCue, Sr.'s plea of *nolo contendere* to charges under § 145 (a), the United States Attorney was, therefore, proceeding not only without the authorization of the Department, but contrary to its express instructions.

If the alleged agreement between counsel for the appellants and the United States Attorney was to operate as a compromise or an estoppel with respect to prosecution under Section 1001 for making false statements, then it

was the duty of appellants' counsel to make it clear to the Court that, by accepting McCue, Sr.'s plea of *nolo contendere* the Court was at the same time disposing finally of any charges which might be made under Section 1001.

Since we are persuaded that there could have been no effective compromise or estoppel without full disclosure to the Court, we find it unnecessary to pass upon the other objections which have been raised, such as the United States Attorney's lack of power to enter into such a compromise agreement or to effect an estoppel against the United States.

III.

We have carefully examined the remaining assignments of error and have concluded that they present no ground for reversal of these convictions.

The judgments are, therefore, affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 981

JAMES O. McCUE, JR., AND JAMES O. McCUE, SR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 5a–17a) has not yet been reported. One opinion of the district court (P.A. 115a–134a)[1] is reported at 178 F. Supp. 426; a second opinion of the district court (P.A. 148a–151a) is unreported.

JURISDICTION

The judgments of the court of appeals were entered on March 20, 1962 (Pet. 1a–4a), and a timely petition

[1] In this brief in opposition, as in the petition for a writ of certiorari, petitioners' appendix in the court below ("Appellants' Appendix") is designated "P.A.," and the government's ("Appellee's Appendix") is designated "G.A."

for rehearing was denied on April 20, 1962. The petition for a writ of certiorari was filed on May 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the bringing of this prosecution for making false oral statements in 1954 to Treasury agents investigating petitioners' income tax liability violated fair standards of federal criminal justice in view of the prior disposition of indictments charging petitioners with attempts in 1951 and 1952 to evade and defeat their income taxes.

2. Whether petitioners' conduct in making false oral statements to Treasury agents in a matter within the jurisdiction of the Internal Revenue Service constitutes a violation of 18 U.S.C. 1001.

3. Whether the government's failure to have certain grand jury testimony recorded by a stenographer constituted reversible error.

4. Whether the question asked of petitioner McCue, Sr., in answer to which he made a false statement, was too vague and ambiguous to support a conviction.

STATUTE INVOLVED

Section 1001 of the Criminal Code (18 U.S.C. 1001) provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or repre-

sentations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On February 2, 1959, the petitioners were indicted in the United States District Court for the District of Connecticut, each on three counts, for having knowingly and wilfully made false statements and representations to special agents of the Internal Revenue Service in August 1954, in a matter within the jurisdiction of the Treasury Department, Internal Revenue Service, in violation of 18 U.S.C. 1001 (P.A. 3a, 6a–8a, 418a–420a). After a seven-week trial before a jury, petitioner McCue, Jr., was convicted in May 1960 on two counts (P.A. 374a–375a) and was fined $5,000 on each count and sentenced to concurrent one-year prison terms, execution of which was to be suspended after service of four months and petitioner to be placed on probation for one year from that date (P.A. 409a). After an eleven-day trial before another jury, petitioner McCue, Sr., was convicted in October 1960 on one count (P.A. 547a) and was fined $5,000 and sentenced to serve a one-year prison term, with the same provision for suspension after four months and one year's probation running from that date (P.A. 551a–552a).

A. EVENTS LEADING UP TO THE PRESENT PROSECUTION

In the latter part of 1954, a Treasury special agent was conducting an investigation of the income tax returns of petitioners for the years 1946–1952 and

those of the Stamford Rolling Mills Company (a corporation) for the fiscal years ended August 31, 1947, through August 31, 1951 (G.A. 52–53, 435). Petitioner McCue, Sr., was President and Treasurer of the corporation; petitioner McCue, Jr., was Vice-President; and the entire stock of the corporation was held by the McCue family and in family trusts (G.A. 89, 153). Petitioners made the false statements involved in this prosecution at separate conferences in August 1954 in response to questions put to them by the agent (see pp. 5–10, *infra*).[2] Some ten months later the agent submitted his report, recommending that both petitioners be prosecuted for the wilful attempted evasion of income taxes (P.A. 178a, 451a–452a; G.A. 53, 439). The agent did not recommend prosecution for the making of false oral statements in 1954 (G.A. 66, 448, 451, 558).

In May 1956 the Department of Justice directed the then United States Attorney to institute criminal proceedings against both petitioners for the wilful attempted evasion of their personal income taxes for the years 1950 and 1951, in violation of Section 145(b) of the Internal Revenue Code of 1939, a felony provision (P.A. 20a). The then United States Attorney requested authorization to prosecute petitioners instead under Section 145(a) of the Code, a misdemeanor provision, but such authorization was

[2] Collaborating in the investigation, of which the special agent was in charge, was an Internal Revenue agent, who handled the "audit" or civil tax aspects of the case and who was present at the conferences in August 1954 (G.A. 53, 418, 637).

denied (P.A. 19a, 21a). In March 1957, a grand jury indicted petitioners for a violation of Section 145(b) (P.A. 14a–18a). On April 15, 1957, the then United States Attorney, appearing in court with petitioners and their counsel, moved the court to allow McCue, Sr., to plead to a misdemeanor charge under Section 145(a) and to dismiss the charge against McCue, Jr. (P.A. 558a, 566a). McCue, Sr., pleaded *nolo contendere*, and the court found him guilty as to two counts, adjudging concurrent sentences of a $10,000 fine, a suspended prison term of one year and two years' probation; the court also dismissed the indictment against McCue, Jr. (P.A. 564a–566a).[3]

B. EVIDENCE OF PETITIONER MCCUE, JR.'S GUILT

Petitioner McCue, Jr., made the false oral statements to a Treasury special agent at a conference held on August 31, 1954 (G.A. 55, 418–429). McCue, Jr., came to the meeting voluntarily, was accompanied by his attorney, was advised of his constitutional rights and stated that he understood them (G.A. 418). He gave testimony under oath (*ibid.*). The counts as to which he was found guilty (Counts I and III) related to false travel vouchers and to water wells drilled on

[3] One week later, the then United States Attorney appeared before the court accompanied by an attorney from the Department of Justice and moved that the judgment convicting McCue, Sr., of violating Section 145(a) be vacated on the ground that, since a violation of that section was not a lesser included offense under Section 145(b), the court had been without jurisdiction to render the judgment. This motion was denied. *United States* v. *McCue*, 160 F. Supp. 595 (D. Conn.).

his personal estate. The evidence of his guilt may be summarized briefly as follows:

1. During the period August 1947–1951, monthly travel vouchers were submitted to the corporation on behalf of petitioner McCue, Jr., averaging $1,774.00 per month over the four-year period (G.A. 372–395). The voucher was usually prepared at the end of each month by McCue, Jr., and given to the corporation's paymaster, who would prepare the "reimbursement" check, cash it at the bank and turn the cash over to McCue, Jr. (G.A. 92, 97–98, 100, 113–114, 133–143). No substantiating documents were ever presented to support McCue, Jr.'s claim for payment (G.A. 104). All of these amounts were treated as deductible expenses by the corporation (G.A. 102). At the August 31, 1954, conference, the Treasury special agent asked McCue, Jr., "Were you at all times at the places shown on the dates shown on these memos?";* petitioner McCue, Jr., answered under oath, "Yes. To the best of my knowledge we were; yes" (G.A. 427). This answer, which was the basis for Count I, was false. As the court below described the government's evidence on this point (Pet. 9a):

> The Government was able to show from corporate records, including the gatemen's books, cafeteria slips and telephone toll slips and from the records of the McCues' country club that they were in fact at the plant or nearby on the dates on which, according to the travel vouchers, they purported to be in other cities.

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* It is clear from the context that "memos" referred to the travel vouchers.

Indeed, defense counsel conceded in his summation to the jury that the McCues were usually not at the places on the dates shown in the travel vouchers (G.A. 305, 317–318; 320–321).

2. At the August 31, 1954, conference, the Treasury special agent asked petitioner McCue, Jr., about some water well drilling services that had been performed on his personal estate but which had been paid for by the corporation and treated by it for tax purposes as deductible expenses. The following questions were asked by the agent and answered by McCue, Jr., under oath (G.A. 423):

> Q. Who negotiated to have this well drilled at your place?
>
> A. I haven't any idea, not even to this day.
>
> Q. Who paid for the well drilling operation?
>
> A. I don't know.
>
> Q. Did you?
>
> A. No, sir. I didn't need it. I didn't want it. I didn't authorize it, and knew nothing about it.

As the court below found, the falsity of these statements, which were the basis for Count III, was "amply established" by the evidence (Pet. 9a):

> McCue, Jr. ordered the well drilled, examined, discussed and accepted the proposal provided by the firm engaged for the work, and ordered them to undertake it. He was kept informed of the work on the well as it proceeded and discussed its progress with drillers. He went with them to choose a spot on his property for drilling the well. As with his father the location of the well drilling equipment, its size and

the noise of the operation make it impossible that he was unaware that a well was being drilled on his property.

The record fully supports this capsule summary by the court of appeals (P.A. 183a–187a, 271a–273a, 278a–279a; G.A. 72–77, 82–84, 147–151, 184–191, 397, 399–415, 417).

C. EVIDENCE OF PETITIONER MCCUE, SR.'S GUILT

Petitioner McCue, Sr., made the false oral statement to a Treasury special agent at a conference held on August 13, 1954 (G.A. 637–653). McCue, Sr., through his attorney, had volunteered to appear before the agents to testify, and this offer was accepted (G.A. 451). He was accompanied by his attorneys, was advised of his constitutional rights and stated that he understood them (G.A. 637–638). He gave testimony under oath (G.A. 638). The count as to which he was found guilty (Count III) related to water wells drilled and reconditioned on his personal estate. The evidence of his guilt may be summarized briefly as follows:

At the August 13, 1954, conference, the Treasury special agent asked McCue, Sr., about some water well drilling and reconditioning services that had been performed on his personal estate. As in the case of his son, the services had been paid for by the corporation, which charged the payments to "Repair Expenses" and took them as deductions on its income tax return. The following questions were asked by

the agent and answered by McCue, Sr., under oath (G.A. 648):

> Q. Who negotiated to have the work done?
> A. Jack McCue [McCue, Sr.'s brother].
> Q. Was he told to have it done?
> A. No, he done a lot of things or all things. He was at my home with people, with customers, at meetings. I presume he did.
> Q. You didn't have a thing to do with it?
> A. Not a thing.

These answers, the last one of which served as a basis for Count III, were false. The court of appeals summarized the evidence establishing their falsity as follows (Pet. 8a):

> * * * McCue, Sr. had in fact on several occasions discussed his need for more water with Downey, the purchasing agent of the Company, and sometime late in 1950 or early in 1951, in his own office and in the presence of McCue, Jr. had instructed Downey to have wells drilled on his property and on the property occupied as a home by McCue, Jr. Downey engaged the services of a company in the business of drilling wells and the two wells were drilled. Downey discussed with McCue, Sr. certain difficulties which were encountered in the course of drilling the wells. The well on the property of McCue, Sr. was about three hundred feet from his house and the derrick used in drilling it was about forty or fifty feet high. The drilling equipment makes a noise like a pile driver.
>
> * * * * *
>
> Jack McCue had nothing whatever to do with the well drilling or the negotiations, and the

men in charge of the drilling had never even heard of him.

The court's summary is fully supported by the record (P.A. 452a–453a, 455a, 456a–460a; G.A. 455–459, 463, 465, 467–470, 480–481, 486–487, 490–492, 506–507, 510–513, 517, 518, 525, 562–563, 636, 655–667).

ARGUMENT

1. Petitioners claim here, as they urged in the court below, that in "repudiating" an alleged agreement not to prosecute the present charges, the government violated "minimal standards of honor and fair dealing in Government prosecutorial practices" (Pet. 9) that should be enforced by this Court (Pet. 8–14). They do not make any legal argument to the effect that petitioner McCue, Sr.'s plea to the earlier charge (see p. 5, *supra*) was "falsely induced" so as to invalidate that conviction, but rather urge intervention by this Court as a matter of its discretion "to exercise its supervisory power over the administration of federal criminal justice" (Pet. 9). The short answer to this request is that the record does not support the existence of an agreement not to press the instant charges. Furthermore, we respectfully urge that as a general rule—and certainly in the circumstances disclosed by this case—the enforcement of informal agreements between counsel is not a proper function of this Court.[5]

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[5] Petitioners appear to have abandoned their contentions, pressed vigorously in the court of appeals, that the instant prosecutions are barred on the theory of estoppel and because their subject matter was part of a binding statutory compromise entered into between defense counsel and the former

(a) As the citations advanced in support of it readily disclose, petitioners' statement (Pet. 8) that "[*t*]*he United States Attorney promised that,* if McCue, Sr. would plead *nolo contendere* to misdemeanor charges, the indictment against McCue, Jr. would be dismissed and *the charge that defendants made false statements to Special Agents of the Internal Revenue Service would not be prosecuted*" (emphasis supplied) is without the slightest foundation.[6] On the contrary, those references show that the possibility of the petitioners' being charged with having made false statements to the government was never even considered in the discussions leading up to the alleged agreement. The only charges that were discussed were the tax evasion charge under Section 145(b) of the 1939 Code and its possible reduction to a misdemeanor charge under Section 145(a) or Section 3616(a) of the 1939 Code for the filing of false returns (P.A. 31a–32a, 39a); there was no discussion of a possible charge for making

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United States Attorney. In any event the trial court, in a lengthy opinion, pointed out many reasons why those points are without merit (P.A. 115a–134a), and the court of appeals agreed (Pet. 14a–17a).

[6] After correctly observing that "the exact confines of the agreement were never clearly defined" (Pet. 14a), the court below stated that "it may be assumed, *for our purposes*, that both the United States Attorney and counsel for defendants understood that the offenses which are the subject of the present prosecution were to be included in the agreed upon disposition of the matter" (emphasis supplied; *ibid.*). This assumption *arguendo* is not a finding that the agreement so provided, for the court plainly meant that in view of the grounds on which it disposed of this issue, it did not matter whether or not the agreement so provided.

false statements to a Treasury special agent in violation of 18 U.S.C. 1001 (*ibid.*; see also G.A. 14–15). No such charge was then pending (P.A. 95a); neither had the investigating agent recommended the prosecution of such a charge (G.A. 66), nor had the Department of Justice been requested to authorize such a charge (P.A. 91a). The then United States Attorney who had made the alleged agreement with petitioners had never given "any thought" (P.A. 99a) to the possibility of bringing a charge under 18 U.S.C. 1001; "all [he] had in mind" in making the agreement was "the disposal of the indictments" then pending (P.A. 91a), and he had not intended, nor did he consider himself authorized, to bind the government "for any charges not then pending" (P.A. 100a).[7]

In short, to the extent that any agreement not to prosecute under 18 U.S.C. 1001 ever existed, it existed only in the minds of petitioners' trial counsel—who, for all the record shows, had not themselves entertained any thought of a possible prosecution for the making of false statements to the government, but who would presumably have been quite receptive to the notion of blanket immunity for their clients from prosecution on any conceivable charges. It borders, we suggest, on an affront to the responsibility of the

[7] The United States Attorney did state that, in making the agreement, he "never intended to bring any other charges" (P.A. 99a); however, he testified that he had never disclosed that intention to petitioners' attorneys (*ibid.*). Moreover, as we have noted, that intention was arrived at without due consideration having been given to the possibility that petitioners should be prosecuted under 18 U.S.C. 1001.

then United States Attorney to allege that he would make a wholesale agreement not to prosecute petitioners on charges which neither he nor they (so far as the record shows) had ever considered. Such an agreement would be so plainly contrary to public policy as not only to be unworthy of enforcement but as to raise serious questions as to the good faith of the parties entering into it.

Nor is it reasonable to suppose that even the broadest sort of agreement not to prosecute further any matters arising out of the filing of petitioners' tax returns would embrace the prosecution of charges under 18 U.S.C. 1001. That statute is wholly distinct from the tax statutes and serves an entirely different governmental purpose. While the criminal tax laws, such as Sections 145(a), 145(b) and 3616(a) of the 1939 Code, *supra*, are designed to protect the federal revenue, 18 U.S.C. 1001 is designed to enforce every citizen's obligation to deal truthfully with his government in all matters within its proper jurisdiction. So diverse are these two classes of enactments that an agreement to refrain from prosecuting under one of them could not properly be considered as embracing the other where such a broad purpose had not been spelled out with the most unequivocal specificity. Especially is this so where, as here, the prosecutions under the two sets of statutes involve wholly separate transactions. The 1957 prosecution under Section 145 of the Internal Revenue Code of 1939 was for attempts, carried out in 1951 and 1952, to evade and defeat income taxes for the years 1950 and 1951 by filing false and fraudulent income tax returns (P.A.

14a–17a); the 1959 prosecution under 18 U.S.C. 1001 was for making false oral statements under oath in 1954 to a duly authorized representative of the government acting in a matter within the jurisdiction of his agency. Plainly enough, the fact that the latter offense occurred in the course of the investigation of the former does not create the identity between the two upon which petitioners base their argument.

(b) Petitioners' efforts retrospectively to transform what was at most a simple agreement not to press any pending tax evasion charges into a wholesale abdication of the prosecutor's responsibilities suggests what is perhaps the most compelling reason for the Court's not entertaining this issue; namely, that such agreements are not ordinarily susceptible of effective judicial enforcement. Agreements between counsel for the parties to a law suit, whether in a civil proceeding or between prosecution and defense, are normally informal. They are not usually reduced to writing or made a matter of record; indeed, as was the case here (G.A. 12–13), the court is often not even informed of the existence of an agreement, let alone of its terms, for the parties to such an agreement do not contemplate that it will ever be judicially enforced or in any way be binding on any court. As the trial court discovered in unsuccessfully attempting to make an accurate reconstruction of this agreement, the parties' recollections of such informal transactions soon fade and, consciously or unconsciously, often tend to reflect what they later wish the agreement had provided (see, *e.g.*, G.A. 34–35). Such vague and often biased retrospect provides no proper

basis for judicial action. The execution of most such agreements must very largely depend, as it has always depended, upon the parties' contemporary understanding and knowledge of its terms and purposes and upon the confidence of each in the good faith of the other.

Moreover, there are many considerations bearing upon whether, or the extent to which, an informal agreement between counsel should be given effect that can be adequately appreciated and acted upon only by the parties themselves. There may, for example, be a critical change in the circumstances to which the agreement relates. Or one or the other of the parties may have failed to make a full disclosure of the relevant facts. By the same token, it would seem that the fact that, in this case, the then United States Attorney acted not only without the authority of the Department of Justice in making the alleged agreement but directly contrary to its instructions (see pp. 4–5, *supra*) would have some relevance in determining how generously the alleged agreement ought to be construed and in what way any doubts should be resolved. Each of these considerations must be weighed by each party in relation to the terms and purposes of the agreement in question and to his own professional and personal conscience. None of them can be properly evaluated in its full context by a court far removed from the circumstances that gave rise to the agreement.

2. Petitioners also argue (Pet. 13–14) that their indictment for tax exasion and their subsequent indictment on the present false statement charges consti-

tuted "multiple prosecutions" such as to raise "serious questions for the administration of federal criminal justice." Petitioners do not argue, nor could they argue, that there was any legal bar to the present prosecution; no question, for example, of double jeopardy is involved. What they do contend is that the general policy of the Attorney General, enunciated in the government's Motion to Vacate the Judgment and Dismiss the Indictment (p. 3) in *Petite* v. *United States*, 361 U.S. 529, 530, that "several offenses arising out of a single transaction * * * should not be made the basis of multiple prosecutions" ought to be enforced—indeed, judicially enforced—in this case.

We note at the outset that the two prosecutions involved here—one based on the filing of fraudulent tax returns in 1951 and 1952, the other based on false oral statements made in 1954—in no sense arose "out of a single transaction" (see pp. 13–14, *supra*). More importantly, however, the enforcement of such policies as this, as well as the ultimate exercise of that broad power of judgment known as the "prosecutor's discretion," have always been thought properly to reside in the Attorney General. Petitioners have suggested no sound reason for transferring that administrative function to this or any other court. Nor does the manner in which executive discretion was exercised in this case suggest any occasion for judicial concern. The prosecution of petitioners and the arguments made on appeal in support of these convictions were authorized, reviewed and re-reviewed at the highest levels of the Department of Justice. While the fraud attempted to be perpetrated upon the government by

petitioners' false oral statements plainly called for vigorous prosecution, the fact that petitioners had previously been prosecuted for tax evasion on not wholly unrelated facts was, of course, a matter to be taken into account. But no less relevant was the consideration that one petitioner (McCue, Sr.) had at that time been convicted of only a misdemeanor and the other had gotten off scot free—both in circumstances where the Department's otherwise invariable policy has been to press for a felony conviction (see G.A. 25–26; Balter, *Fraud Under Federal Tax Law* (2d ed.), p. 140). The executive determination was neither lightly nor carelessly made, nor, we submit, was it inequitable. We suggest that, on the contrary, a failure to prosecute might well have been viewed as a gross discrimination in favor of the wealthy and influential.

3. Petitioners contend (Pet. 15–25) that Section 1001 of the Criminal Code does not apply to the false statements they made to the Treasury special agent because (a) in their view, the false statements did not pervert the functioning of government offices, (b) the statements were made in response to questions put by a criminal investigator, and (c) the statements were oral. None of these arguments has merit.[8]

[8] Petitioners' argument as to the severity of the punishment permissible under 18 U.S.C. 1001 (Pet. 17) was answered by this Court 20 years ago when it stated (*United States* v. *Gilliland*, 312 U.S. 86, 95): "The matter of penalties lay within the discretion of Congress. Section [1001] covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations."

(a) Petitioners repeatedly (Pet. 16, 17, 18) urge that their conviction cannot stand because their false statements did not succeed in perverting the functioning of a government office. But it is settled that the existence of an offense under 18 U.S.C. 1001 does not depend upon the false statement's having succeeded in its fraudulent purpose. *United States* v. *Gilliland*, 312 U.S. 86, 93; *Butzman* v. *United States*, 205 F. 2d 343 (C.A. 6), certiorari denied, 346 U.S. 828; *De Rosier* v. *United States*, 218 F. 2d 420, 423 (C.A. 5); *United States* v. *Apex Distributing Co.*, 148 F. Supp. 365, 371 (D.R.I.); *United States* v. *Quirk*, 167 F. Supp. 462, 464 (E.D. Pa.), affirmed per curiam, 266 F. 2d 26 (C.A. 3). Moreover, petitioners' conduct here (see pp. 5–10, *supra*) was plainly *calculated* to pervert the functioning of the Internal Revenue Service—*i.e.*, deceptively to induce misdirected administrative action by persuading the Treasury agents that the investigations against both petitioners and their corporation should be wound up without criminal or civil sanctions, and with as small a tax deficiency assessment as possible. The fact that the effort failed is of no consequence so far as 18 U.S.C. 1001 is concerned.

(b) Equally without merit is petitioners' broad argument (Pet. 17–20) that the statute was not intended to apply to any false statements made to criminal investigators.[7] The statute contains no such

[7] It should be recalled (see note 2, p. 4, *supra*) that the false statements here were made not only to the special agent but also to the Internal Revenue agent who was present and who was in charge of the civil aspects of petitioners' tax cases. See *Knowles* v. *United States*, 224 F. 2d 168 (C.A. 10).

limitation, and the appellate cases are to the contrary. *Brandow* v. *United States*, 268 F. 2d 559 (C.A. 9); *United States* v. *Silver*, 235 F. 2d 375, 377 (C.A. 2); *Cooper* v. *United States*, 282 F. 2d 527, 530 (C.A. 9); *Cohen* v. *United States*, 201 F. 2d 386, 392 (C.A. 9), certiorari denied, 345 U.S. 951.[10] This Court has said that 18 U.S.C. 1001 should be construed "according to its literal and natural import" (*United States* v. *Gilliland*, 312 U.S. 86, 90–91) and that Congress had made clear its purpose (312 U.S. at 93)

> to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction.

See also *United States* v. *Bramblett*, 348 U.S. 503, 509–510. We submit that to construe 18 U.S.C. 1001 as not applying to duly authorized representatives of government departments conducting investigations upon substantive matters within the jurisdiction of the same departments, because a criminal prosecution was foreseeable, would plainly frustrate the intention

[10] Petitioners rely (Pet. 18–19) on three district court cases—two of them from the Second Circuit and only one of which, *United States* v. *Philippe*, 173 F. Supp. 582 (S.D.N.Y.), involved a Treasury special agent. The rationale of *Philippe* was that false statements to a special agent "are hardly calculated to, and cannot possibly pervert the authorized functions of a Special Agent" (173 F. Supp. at 584). As we have shown (see p. 18, *supra*), this is an erroneous assumption, and the Second Circuit in the case at bar expressly overruled the *Philippe* case (Pet. 13a).

of Congress to protect the authorized functions of the government.[11]

(c) The third part of petitioners' argument that Section 1001 does not apply to their case is that it was intended to cover only written statements (Pet. 20–25). The argument is without foundation. The language of the statute is clear and comprehensive;[12] as this Court pointed out in *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46, "no distinction is made in [Section 1001] between written and oral statements," and the courts of appeals have uniformly held that the statute does apply to oral statements. *United States* v. *Meyer*, 140 F. 2d 652, 655 (C.A. 2); *United States* v. *Zavala*, 139 F. 2d 830 (C.A. 2); *Marzani* v. *United States*, 168 F. 2d 133 (C.A.D.C.), affirmed by equally divided Court, 335 U.S. 895; *Knowles* v. *United States*, 224 F. 2d 168 (C.A. 10); cf. *Smith* v. *United States*, 257 F. 2d 133 (C.A. 10); *Cooper* v. *United States*, 282 F. 2d 527 (C.A. 9). Petitioners recite at length the legislative history of a bill that never became law (Pet. 20–24), but all they are able

[11] Petitioners express the "hope" (Pet. 18) that "[w]e have * * * come too far along the road in the development of our national traditions to entertain any notion that a citizen owes an allegiance of fidelity to an individual Government criminal investigator". We suggest that, on the contrary, it is a mark of the high development of our national traditions that we recognize the citizen's "allegiance of fidelity" to his government, whether he deals with that government through "an individual Government" administrator, "an individual Government" judge or "an individual Government criminal investigator."

[12] It is noteworthy that the statute deals with both "false, fictitious or fraudulent statements or representations" *and* "any false writing or document," indicating a clear intention to comprehend something broader than mere writings or documents.

to say (and, indeed, all that can be said in support of their position) about the bill that produced Section 1001 in its present form is that "there is not a solitary suggestion" in the legislative background that the statute was to apply to oral statements (Pet. 25). As was said about a comparable attack on this statute shortly after it was enacted, "such uncertain and at best negative evidence of legislative purpose cannot serve to limit the clear statement of the new statute." *United States* v. *Goldsmith*, 108 F. 2d 917, 919 (C.A. 2), certiorari denied, 309 U.S. 678; cf. *Brouder* v. *United States*, 312 U.S. 335, 338.

4. The contention (Pet. 25–27) that the government committed reversible error in failing to have certain grand jury testimony recorded is without

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[1] Petitioners also suggest (Pet. 17) that the "two witness" rule applicable to perjury prosecutions should have been satisfied in the present case and was not. This was argued for the first time in the court below, no such point having been raised in the district court. In *Weiler* v. *United States*, 323 U.S. 606, relied upon by petitioners (Pet. 17), a perjury conviction was reversed for the trial court's failure to give a requested instruction relating to the "two-witness" rule. In the case at bar the petitioners not only failed to request such an instruction but requested inconsistent instructions, under which verdicts of guilt could be based on circumstantial evidence (C.A. 367, 368, 630–631). Moreover, the "two witness" rule does not apply to prosecutions under Section 1001. *United States* v. *Killian*, 246 F. 2d 77, 82 (C.A. 7); *Fisher* v. *United States*, 254 F. 2d 302 (C.A. 9), certiorari denied, 358 U.S. 895; *Todorow* v. *United States*, 173 F. 2d 439 (C.A. 9), certiorari denied, 337 U.S. 925; *Travis* v. *United States*, 269 F. 2d 928 (C.A. 10), reversed on other grounds, 364 U.S. 631. Finally, the proof in the instant case was so strong that the "two witness" rule was satisfied (see pp. 5–10, *supra*; compare *Hammer* v. *United States*, 271 U.S. 620, 627; *United States* v. *Wood*, 14 Pet. 430, 443).

merit. It is true, of course, that there are occasions when a trial court may in its discretion order grand jury testimony produced for a defendant's use in the cross-examination of government witnesses, *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400, but there is no rule that we are aware of requiring the recording of such testimony. Petitioners' main complaint is that the testimony of the special agent was not recorded. However, there was no need to record such testimony, for at both trials the government turned over to the court a large number of reports and memoranda prepared by the agent, after which a large part of this material (including some of the exhibits to the reports) was turned over to the defense for use in cross-examining the agent (G.A. 61, 443–445). These reports and memoranda adequately took the place of a transcript of the agent's testimony, for there obviously would be no reason for him to give testimony before the grand jury in conflict with his prior reports and memoranda and his later testimony at the trial.

5. Equally lacking in merit is the contention (Pet. 28–30) that the Treasury agent's questions to petitioner McCue, Sr., were too vague. The argument is that when he answered, "Not a thing," to the question, "You didn't have a thing to do with it?" (see pp. 8–9, *supra*), all he meant was that he did not personally negotiate with the well-drilling firm to have the well drilled. The point was raised at the trial, and the jury was instructed in minute detail

as to what it would have to find in order to convict.[6] This submission was proper, for the jury had to consider the context in which the question was asked. *Conrad v. United States*, 255 F. 2d 247 (C.A. 5); *Seymour v. United States*, 77 F. 2d 577, 584 (C.A. 8); *Young v. United States*, 214 F. 2d 232 (C.A. D.C.).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1962.

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[6] "To summarize: In order to convict on this third count of the indictment, you must find the pronoun 'it' in the question refers to having the work done; that the defendant fully understood that the word 'it', as used by the questioner, referred to having the work done; that the defendant in his answer did not intend to indicate only that he had nothing to do with the negotiations for or the actual performance of the well drilling and reconditioning services, and that the defendant did intend falsely to say that he had not told Dowzey to have well drilling and reconditioning services performed on McCue, Sr.'s, private estate" (P.A. 533a).

U.S. GOVERNMENT PRINTING OFFICE 1962

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Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JAMES O. McCUE, JR. and
JAMES O. McCUE, SR.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

1. Petitioners argued that the Government's repudiation of the 1957 agreement not to prosecute them for alleged false statements violated fair standards of criminal justice. In answer, the Government contends "that the record does not support the existence of an agreement not to press the instant charges" (Gov. Br. 10).

However, both the Court of Appeals (Pet. 14a) and the District Court (P. A. 119a)* assumed that there was such an agreement. Indeed, in the Court of Appeals, the Government itself did *not* deny that the agreement was made nor did it challenge petitioners' recital of its terms.

Moreover, the record fully supports petitioners' claim. Both the United States Attorney and Mr. Steadman, one of defendants' counsel, have testified that they intended the

*"P. A." refers to Petitioners' (Appellants') Appendix and "G. A." refers to Government's (Appellee's) Appendix, both in the Court of Appeals.

1957 agreement to dispose of all criminal matters then known to the Government arising out of the Special Agent's investigation and referred to in the investigative file then in the possession of the United States Attorney; these matters included the alleged false statements.* (P. A. 12a, 99a-100a; see also P. A. 23a-25a). Mr. Steadman also testified that both the United States Attorney and defense counsel acknowledged this intention to each other at a conference on April 15, 1957 in the following exchanges:

(a) Mr. Steadman brought the alleged false statements to the United States Attorney's attention and said, referring to the alleged false statements, "I want to emphasize that we—it is our intention and we want it understood here, that we are attempting and want to wind up all of the issues arising out of this income tax investigation, including this particular problem." The United States Attorney responded by saying, "Well, I understand that that's the objective" (P. A. 41a).

(b) Near the end of the conference Mr. Lowman said to the United States Attorney, "But as to these matters that are covered in this investigation here, that were covered in your files, is it understood that this [agreement] will wind up and conclude the whole thing?" The United States Attorney responded by saying either, "That's what the reason is for our undertaking here," or "That's the reason for being here" (P. A. 42a).

Solely on this point of the explicitness with which the agreement was stated is there a degree of inconsistency in

*The Special Agent's report contained in the investigative file discussed certain statements made by the McCues (the statements involved in the case at bar—and alleged that these statements were false (P. A. 33a, 38a, 104a, 179a, 451a), although no recommendation for prosecution was made at that time.

the testimony of the United States Attorney. The United States Attorney testified that he had no recollection of acknowledging his intention to defense counsel, although he testified that he might have done so (P. A. 98a), that he would not deny doing so (P. A. 111a), and that he *did* tell defense counsel that he "didn't intend to bring any other charges against the McCue's . . ." (P. A. 99a).

In any event, as the United States Attorney testified, the conversations left no doubt in anyone's mind as to the scope of the agreement reached. In response to a question by defense counsel as to whether this disposition "wound up" everything that was then before the United States Attorney, i.e., "the present indictment" and "everything that was contained in that file," the United States Attorney testified:

> "I think there was no question about that in your own mind, and there was certainly no question about it in mine." (P. A. 99a).

And the United States Attorney further testified:

> "Q. The agreement was—and you say it—that this would terminate the pending criminal proceedings against the McCue's, then covered by the information in the investigative file in the office of the United States Attorney? A. That is true.
>
> Q. In that investigative file, were specific references to false statements made in 1954, were there not? A. Yes, there were." (P. A. 101a).
>
> * * *
>
> Q. When you did say it was agreed, what you meant was that there would be no further prosecution; isn't that so? A. That's right.
>
> By the Court:
>
> Q. No further prosecution of what? No further prosecution of the indictment? A. Violation of the internal revenue laws relating to evasion of taxes.

By Mr. Lowman:

Q. And with respect to the information contained in the investigative file? A. Right.

Q. The investigative file contains the false statements, does it? A. I don't know what—it's contained a lot of things, Mr. Lowman.

Q. It did contain the false—— A. Yes, it did contain the false statements." (P. A. 113a; see also P. A. 23a-25a).

The Government seeks to minimize the importance of the question presented to this Court by stating that it merely involves enforcement of "agreements between counsel for the parties to a lawsuit" (Gov. Br. 14) and by stating that compliance with "an informal agreement between counsel" for the "parties" (Gov. Br. 15), is a matter of "professional and personal conscience" for "each party" (Ibid.). The point this bland language overlooks—the point requiring determination by this Court—is the question of whether the Government of the United States is just another "party," whether the Government should not be held to a higher standard of fair dealing than the most unscrupulous civil litigant; whether, in short, a repudiation by the United States Government can justly be dismissed as a matter of no more than "professional and personal conscience."

2. The Government seeks to defend the multiple prosecutions of the petitioners on the ground that the 1957 dispositions of the tax evasion indictments resulted in a violation of the Justice Department's otherwise invariable policy to press for a felony conviction in tax cases (Gov. Br. 17). Accordingly, says the Government, a failure to prosecute these defendants might well have been viewed as a gross discrimination in favor of the "wealthy and influential" (Gov. Br. 17).* In so defending these prosecutions, the

*The Government also urges that "the fraud attempted to be perpetrated upon the government by petitioners' false oral statements plainly called for vigorous prosecution" (Gov. Br. 16-17). But

Government clearly acknowledges that they were not brought for the principal purpose of protecting the Internal Revenue Service against false statements. Instead, the Government is using § 1001 to give the Government a second chance to subject these defendants to felony treatment for their alleged violations of the Internal Revenue laws. The Government thus proclaims that it is not using § 1001 to protect Government departments from perversion of their proper functioning by means of false statements.

In *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955), the court condemned a similar attempt to use § 1001 to impose punishment for other substantive offense for which the defendants there had previously been indicted. The court wrote:

> "It seems quite inconsistent with our fundamental concepts of due process in the administration of criminal justice to abandon charges of bribery and perjury against the defendants, and then to indict them for previously denying their complicity therein, as a different separate substantive criminal offense under section 1001. The clear purpose of the section was to operate as a shield for defense rather than as a sword for attack." *Id.* at 207.

The possibility of misuse of § 1001 to enable the Government to bring a second round of prosecutions when it is "disappointed" with the first round (Gov. A. 38), emphasizes the evils inherent in applying § 1001 to answers to criminal investigators.

3. The Government cites several cases to attack "petitioners' broad argument . . . that the statute was not in

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the Government knew about this "fraud" at the time of the 1957 tax evasion indictments and did not prosecute (P. A. 33a, 38a, 86a, 104a). The Government became concerned with this "fraud" only after the "disappointing" disposition of the 1957 indictments.

tended to apply to any false statements made to criminal investigators." (Gov. Br. 18). In fact, our contention (not quite so "broad") is that the statute does not apply to exculpatory answers given by suspects in response to questions posed by criminal interrogators investigating the suspect's guilt. This issue was presented in none of the Government's cases.

In *United States* v. *Silver*, 235 F. 2d 375 (2d Cir.), *cert. denied*, 352 U. S. 880 (1956), where the issue here raised as to the scope and effect of § 1001 was not presented, the Court upheld the conviction of an employee of the Internal Revenue Service who falsely answered questions posed to him by an Inspector of the Internal Revenue Inspection Service engaged in investigating alleged bribery of the employee. (The Court's opinion inadvertently states that the interrogator was a Special Agent but the Government's brief clarifies his status). The Inspector operated under the Assistant Commissioner (Inspections), who was responsible for

> "The assurance of scrupulous adherence to proper ethics and standards of conduct by all personnel, and avoiding and detecting irregularities, defalcations, etc., appraising management and operations to promote economy and efficiency and foster continuing attention to improvements; conducting personnel investigations and such investigations as the Commissioner may direct."

Exhibit D to Commissioner's Reorg. Order No. Hdq—1, July 29, 1952, reprinted in 4 P-H 1952 Fed. Tax Serv. ¶ 76,326 at p. 76,289.

Accordingly, the interrogator was not a criminal investigator and was not gathering evidence for purposes of criminal prosecution.* Instead the interrogation concerned

*Indeed, the statute of limitations had run on the possible bribery offense at the time of interrogation.

the internal administrative functioning of the Internal Revenue Service—including the integrity of Internal Revenue practices, and the question of whether tax returns of possible bribe givers should be reopened; a false answer may well have perverted this functioning.

The case of *Brandow* v. *United States*, 268 F. 2d 559 (9th Cir. 1959), involved a similar problem, for the defendant there gave an affidavit to a Special Agent investigating activities of *a Revenue Agent*; in his affidavit the defendant falsely denied having told a taxpayer that the Revenue Agent disclosed to the defendant the Government's case against the taxpayer.

Cohen v. *United States*, 201 F. 2d 380 (9th Cir.), *cert. denied*, 345 U. S. 951 (1953) is a case where the legal issue raised under this heading was not presented to, or considered by, the Court, and where the defendant's statement consisted of a written net worth schedule, a type of affirmative representation whose "perverting potential" distinguishes it from an oral exculpatory denial for reasons clearly set forth in *United States* v. *Philippe*, 173 F. Supp. 582, 584-85 (S. D. N. Y. 1959).

In *Cooper* v. *United States*, 282 F. 2d 527 (9th Cir. 1960) again the legal issue raised here was not considered, as emphasized by the fact that it is difficult to tell from the opinion whether the false statement was made to two Special Agents (as stated in the indictment), or to one Special Agent and one Revenue Agent (as stated in the transcript of interrogation), or to two Revenue Agents (as stated in the Court's opinion). As was pointed out in the Petition herein, "Revenue Agents" are not criminal investigators. Their sole function is to determine how much tax is owed the Government. Special Agents, on the other hand, are criminal investigators (Pet. 15).*

*The Government seeks to avoid the foregoing distinction, and the clear issue of statutory interpretation it presents, by noting that

The only cases which do consider the precise issue raised here (the cases referred to summarily in a Government footnote, Gov. Br. 19 n. 10) hold that 18 U. S. C. § 1001 does not apply to exculpatory answers given by suspects undergoing criminal interrogation with respect to their guilt. *United States* v. *Stark*, 131 F. Supp. 190 (D. Md. 1955); *United States* v. *Dawey*, 155 F. Supp. 175 (S. D. N. Y. 1957); *United States* v. *Philippe*, 173 F. Supp. 582 (S. D. N. Y. 1959). In the face of this line of authority, the Government's continued use of 18 U. S. C. § 1001 to gain convictions of such suspects presents a situation calling for resolution by this Court.

4. The cases the Government relies on do not support the conclusion that § 1001 applies to oral utterances.

In *United States* v. *Beacon Brass Co.*, 344 U. S. 43 (1952), the Court decided that oral misrepresentations constituting a willful effort to evade taxes could be prosecuted under § 145(b), Internal Revenue Code of 1939. In disposing of petitioner's claim that the prosecution was barred because such oral misrepresentations were exclusively covered by 18 U. S. C. § 1001 (there designated as Section 35(A), Criminal Code), the Court assumed *arguendo* that § 1001 covered oral utterances and went on to conclude that this was no bar. Since both the petitioner and the Government stated that § 1001 applied to oral utterances, this question was not litigated before the Court, and the

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an Internal Revenue Agent sat in on the conference in the case at bar. (Gov. Br. 18, n. 9). But the defendants were indicted for false answers while being "interrogated by Special Agents of the Internal Revenue Service" (P. A. 6a, 418a) and thus were convicted not of false answers to the Internal Revenue Agent but of false answers to the Special Agents. Nor does the record support the Government's speculation that the defendants here sought to avoid civil liability as well as criminal sanctions (Gov. Br. 18). Indeed, whether or not the Government's surmise is accurate, the perversion of a governmental function is measured by what that function was intended to be—in this instance the function of criminal investigation—not by the defendants' aspirations.

arguendo nature of the Court's dictum is pointed up by the way the Government briefed this question: "The Fact that Appellee's Conduct *May Have* Violated Section 35(A) of the Criminal Code [now 18 U. S. C. § 1001] Is No Bar. . . ." Government's Brief, *United States* v. *Beacon Brass Co.*, *supra*, p. 15 (emphasis supplied).

In *Marzani* v. *United States*, 335 U. S. 895 (1948), the Supreme Court affirmed by an equally divided court a decision of the Court of Appeals for the District of Columbia, 168 F. 2d 133 (D. C. Cir. 1948), which ruled against the defendant on the following issue presented in a Petition for Rehearing:

> "The issue is whether the statute can be consistently applied to a prosecution for statements not required to be made, not under oath, not stenographically transcribed, never reduced to writing, made at a private conference initiated wholly at appellant's request, which he was not required to attend, solely to ask the reasons of his superior in the government for a request which had been made for appellant's resignation, where the only two participants in the conference addressed each other throughout by their first names and discussed a wide variety of other topics, where no suitable notice was given by regulation or otherwise of the consequences of knowingly and wilfully making any false and fraudulent statement, and where the statute provides criminal penalties for false and fraudulent statements made 'in any manner within the jurisdiction of any department or agency of the United States.'": 168 F. 2d at 141.

The above question was specifically directed at the issue of "due process and a fair trial." Record on Appeal, *Marzani* v. *United States*, *supra*, p. 282. Although the Circuit Court's decision rejecting this contention included a sentence stating that § 1001 is not limited to written statements, 168 F. 2d at 142, the question of whether the statute covered

oral statements was not argued or briefed either to the Circuit Court or to the Supreme Court.

Knowles v. *United States*, 224 F. 2d 168 (10th Cir. 1955) did not involve oral statements, as the Government contends, but rather written net worth statements, and the Court decided this case on the basis of the fact that written net worth statements were involved. The Record on Appeal indicates that in a collateral attempt to discredit broad statements made by the Government concerning the scope of § 1001, the defendant argued that the statute did not apply to oral statements. It was this argument, having nothing to do with defendant Knowles' own case, to which the Court referred in its description of defendant's various assertions.

In *United States* v. *Zavala*, 139 F. 2d 830 (2d Cir. 1944) and *United States* v. *Meyer*, 140 F. 2d 652 (2d Cir. 1944), there are one-sentence statements to the effect that former 18 U. S. C. § 80 (which embodied § 35, Criminal Code), the predecessor of 18 U. S. C. § 1001, applied to oral statements. In the former case the Court wrote that there was, in any event, "a written document furnished both in its original and amended form by the defendant, and in either form . . . false," 139 F. 2d at 831, and the Court's statement concerning oral statements was therefore dictum. The latter case cites the former as authority. 140 F. 2d at 655.

Respectfully submitted.

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June 19, 1962